

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID E. CARDINAL
Claimant

VS.

CITY OF OLATHE
Self-Insured Respondent

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Docket Nos. 1,027,199
& 1,027,267

ORDER

Respondent appealed the November 3, 2009 Preliminary Decision entered by Administrative Law Judge Marcia L. Yates Roberts.

ISSUES

Claimant requests medical benefits. At issue in particular is a right total knee replacement. In the November 3, 2009 Preliminary Decision, ALJ Yates Roberts found, in part:

After consideration of the medical evidence presented to the court, it is found that although Claimant's need for a right total knee replacement is a direct and natural consequence of his prior history of right knee injuries and surgeries as well as his overweight status, the vocational injury to the left knee and the resultant need for a left total knee replacement required Claimant to ambulate with an altered gait that caused an increase or acceleration of the right knee complaints. . . .¹

The ALJ then ordered respondent to provide medical treatment as recommended by the court-appointed physician, Dr. James P. Reardon.

Respondent acknowledges responsibility for treatment to claimant's left knee due to a compensable work-related accident on August 30, 2005. Respondent, however, contends claimant is not entitled to receive medical treatment to his right knee as a result of his work-related injury to his left knee. Respondent argues claimant's need for a right total knee replacement is the direct and natural consequence of the preexisting degenerative condition in his right knee and claimant's weight and that it is not due to an

¹ ALJ Preliminary Decision (Nov. 3, 2009) at 1.

aggravation or acceleration of his preexisting condition from favoring his left knee. Further, respondent argues that if claimant's left knee injury contributed to his right knee symptoms, that does not constitute as a compensable aggravation or acceleration. Respondent requests the Board reverse the November 3, 2009 Preliminary Decision and deny claimant's request for treatment to his right knee.

Claimant requests the Board to affirm the Preliminary Decision. Claimant contends his August 30, 2005, accidental injury and the resulting left total knee replacement led to an altered gait and aggravation to his right knee. Claimant asserts he has proven the injury to the right knee is a direct and natural consequence of his job-related injury.

The only issues before the Board on this appeal are:

1. Is the injury to claimant's right knee a direct and natural consequence of the job-related injury he sustained in 2005 while working for the respondent?
2. Did the ALJ exceed her jurisdiction and authority by granting claimant's request for medical treatment to his right knee?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

The Board has the jurisdiction to review allegations that an administrative law judge exceeded his or her jurisdiction. K.S.A. 2008 Supp. 44-551(i)(2)(A) provides:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. . . .

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the various conditions on which that right depends.² "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."³

² K.S.A. 2005 Supp. 44-501(a).

³ K.S.A. 2005 Supp. 44-508(g).

While working for the city of Olathe in August 2005 the claimant suffered a compensable injury to his left knee. The treatment to the left knee led to four surgeries, including a left total knee replacement in April 2007. The left knee replacement caused the claimant to favor his left leg and compensate with his right leg. Claimant also had weight gain subsequent to the left knee replacement.

Claimant had preexisting issues with his right knee stemming from a 1974 sports injury. He had six surgeries on the right knee prior to the 2005 work injury. He also had arthritis in his right knee as a result of the sports injury. Dr. Dick Geis, at the request of claimant's attorney, examined the claimant in June 2006. Dr. Geis reported that claimant's "right knee symptoms are related to ambulation stresses secondary to his left knee injury, surgery and rehabilitation."⁴

The claimant testified he started getting a lot of pain in his right knee after the left knee replacement surgery.

In September 2008, at the request of the claimant's attorney, orthopedic surgeon Dr. C. Reiff Brown also examined claimant. Dr. Brown's report states, in part: "A limping gait caused by his [claimant's] left knee injury has precipitated increased symptoms involving the right knee rendering the preexisting degenerative change[s] symptomatic in that area."⁵

At a November 13, 2008 preliminary hearing the claimant requested treatment for his right knee. Based on the evidence presented the ALJ ordered an independent medical evaluation (IME). Dr. James P. Reardon performed the IME and recommended treatment for both of claimant's knees. After receiving Dr. Reardon's report, the ALJ found the recommendations were appropriate and appointed Dr. Reardon as the authorized treating physician to treat claimant's knee injuries.

Dr. Reardon then commenced treating claimant. His current recommendations include a right total knee replacement and additional treatment for claimant's left leg. At the October 29, 2009 preliminary hearing the claimant requested that the treatment recommended by Dr. Reardon be provided. It was so ordered and this appeal followed.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the

⁴ P.H. Trans. (Nov. 13, 2008), Cl. Ex. 2 at 5.

⁵ *Id.*, Cl. Ex. 1 at 3-4.

affliction.⁶ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.⁷

The respondent argues that the ALJ erred in awarding the claimant medical treatment related to his right knee because respondent contends the need for a right knee replacement is due to claimant's extensive preexisting problems and his weight and not his compensable left knee injury. In support of this position, respondent relies on Dr. Reardon's opinion that claimant "is going to need a knee replacement on the right side regardless of what happened and that his weight is the number one reason that he has arthritis in his right knee."⁸

The issue is not what is the number one reason for the arthritis but, rather, did the left knee injury aggravate or accelerate the preexisting condition of the claimant's right knee.

In his August 7, 2009 letter to claimant's attorney, Dr. Reardon states:

[H]owever, I can also say that because of the injury to the left knee, Mr. Cardinal was required or forced to walk on his right knee as his only "good knee". This would cause increased complaints of pain arising from that knee. I do not believe it would accelerate the degeneration of that knee; however, his complaints would increase and, more than likely, he would experience more problems with his right knee because of the need to put more weight on it. . . .⁹

The claimant admits to the preexisting problems with his right leg. He testified, however, that he had not experienced any problems with the right knee for two years prior to the work-related injury to his left knee. As early as 2006 claimant experienced swelling in his right knee. According to Dr. Geis' June 2006 report the swelling was related to the left knee injury. Both Dr. Brown and Dr. Reardon agree that the altered gait caused by the left knee surgery put additional stress on the claimant's right knee. The question is whether that stress aggravated or accelerated his preexisting condition. Although there are other factors contributing to the claimant's condition, they do not negate the fact that

⁶ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁷ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

⁸ Reardon Depo. at 9-10.

⁹ *Id.*, Ex. 3.

the altered gait aggravated or accelerated the right knee complaints. Based on the record at this point, claimant has sustained his burden of proof. The right knee condition is a direct and natural consequence of the work-related injury claimant sustained while working for the respondent. The order of the ALJ is affirmed.

The ALJ had the authority to determine claimant's right to receive medical benefits as K.S.A. 44-534a(a)(2) provides: "Upon a preliminary finding that the injury to the employee is compensable . . . the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation"

This member of the Board has reviewed the record and concludes that the Preliminary Decision entered by the ALJ should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, this Board Member affirms the November 3, 2009 Preliminary Decision entered by ALJ Yates Roberts.

IT IS SO ORDERED.

Dated this ____ day of January, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent
Marcia L. Yates Roberts, Administrative Law Judge

¹⁰ K.S.A. 44-534a.